



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: AUGUST 09, 2022

IN THE MATTER OF:

Appeal Board No. 622555

PRESENT: MARILYN P. O'MARA, MEMBER

In Appeal Board No. 622555, the claimant appeals from the decision of the Administrative Law Judge filed March 17, 2022, insofar as the decision sustained the initial determination holding the claimant ineligible to receive benefits, effective March 22, 2020 through February 14, 2021, on the basis that the claimant was not totally unemployed, as modified to be effective March 23, 2020 through January 17, 2021, plus two days in the week ending February 7, 2021 and three days in each of the weeks ending January 24, 2020, January 31, 2020 and February 14, 2020.

In Appeal Board No. 622556, the claimant appeals from the decision of the Administrative Law Judge filed March 17, 2022, insofar as the decision sustained the initial determination charging the claimant with an overpayment of \$5,798 in regular unemployment insurance benefits recoverable pursuant to Labor Law § 597 (4), \$12,300 in Federal Pandemic Unemployment Compensation

(FPUC) benefits recoverable pursuant to Section 2104 (f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020, \$4,683 in Pandemic Emergency Unemployment Compensation (PEUC) benefits recoverable pursuant to Section 2107 (e)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020, and \$1,800 in Lost Wages Assistance (LWA) benefits recoverable pursuant to 44 CFR Sec. 206.120 (f)(5), as modified to \$5,798 in regular unemployment insurance benefits, \$1,800 in LWA benefits, FPUC benefits for the period of March 22,

2020 through January 17, 2021, only, and PEUC benefits as modified to reflect that the claimant had one day of PEUC eligibility in the statutory weeks

ending January 24, 2021, January 31, 2021, and February 14, 2021, and two days in the statutory week ending February 7, 2021.

In Appeal Board No. 622557, the claimant appeals from the decision of the Administrative Law Judge filed March 17, 2022, insofar as the decision sustained the initial determination reducing the claimant's right to receive future benefits by 376 effective days and charging a civil penalty of \$869.70 on the basis that the claimant made willful misrepresentations to obtain benefits, as modified to impose a forfeit penalty of 376 effective days and a civil penalty in an amount in accordance with the decision and referred the amount of the civil penalty to the Department of Labor for recalculation.

At the combined telephone conference hearings before the Administrative Law Judge, all parties were accorded a full opportunity to be heard and testimony was taken. There was an appearance by the claimant.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: After separating from other employment under circumstances not at issue, the claimant filed an original claim for benefits, effective March 9, 2020. She was aware that the handbook was available on-line and was advised to read it. The handbook states that she must report all work, including part-time work, even if she worked for less than an hour on a given day.

For the period of March 22, 2020 through February 14, 2021, the claimant worked for this employer part-time as an instore shopper. She was paid \$13.50 per hour. The claimant did not have a schedule. Each week she worked up to four hours per day on five or six days per week.

For the week ending January 24, 2021, the claimant worked 23.50 hours for which she was paid \$317.25 gross. For the week ending January 31, 2021, she worked 27 hours for which she was paid \$364.50 gross. For the week ending February 7, 2021, she worked 15.21 hours for which she was paid \$205.43 gross. The claimant's last day of work was February 8, 2021, on which she worked four hours.

The claimant certified for benefits for each week. For each week through the week ending January 17, 2021, she was reminded that she had to report each day of work, including part-time work. She was asked how many days she had worked,

including self-employment, during the week for which she was certifying. After January 17, 2021, when the claimant certified for benefits, she was reminded that she had to report hours of work, including part-time work. During this period she was asked how many hours she had worked, including self-employment, during the week for which she was certifying. Each week, from the week ending March 29, 2020 through the week ending February 14, 2021, with the exception of the April 8, 2020 certification by the claimant for the week ending April 5, 2020, she always stated she worked zero days. For the week ending April 5, 2020, she certified that she had worked four days that week. On May 11, 2020, the claimant was sent a form to recertify for the week ending April 5, 2020. She was advised to accurately complete the form. On May 12, 2020, the claimant recertified for the week ending April 5, 2020 and indicated that she had not worked that week by marking that she was eligible for benefits.

The claimant received \$5,798 in regular unemployment insurance benefits, \$12,300 in FPUC benefits, \$4,683 in PEUC benefits, and \$1,800 in LWA benefits.

OPINION: The credible evidence establishes that in the period of March 23, 2020 through January 17, 2021, the claimant worked four or more days each week. As the claimant was not totally unemployed in each of these weeks, she was ineligible to receive benefits for these weeks.

With respect to the period beginning January 18, 2021, new rules were in effect to determine total unemployment. 12 NYCRR § 470.2(h), "Day of Total

Unemployment," effective January 18, 2021, provides:

1. For the purpose of calculating the number of effective days in a week to determine a claimant's weekly benefit entitlement in accordance with Labor Law § 590, a claimant shall experience a "day of total unemployment" or "full day

of total unemployment" on each day that is not a day of employment.

2. The total number of "day(s) of employment" in a week shall be calculated by adding the total number of hours worked in a week of employment, provided however that no hours in excess of ten are included per calendar day, dividing the total number of hours by ten, and rounding up to the nearest whole number. If the total number of hours worked in a week is equal to or less than four hours, no day of employment will have occurred. A claimant who works a total of 8 hours in a week shall be deemed to have engaged in one day of employment,

and a claimant who works a total of 13 hours in a week shall be deemed to have engaged in two days of employment, except that if the 13 hours occurred on one calendar day, such claimant shall be deemed to have engaged in one day of employment.

The claimant admittedly was paid \$13.50 per hour and produced her pay record stating her gross pay for each of the three weeks ending January 24, 2021 through February 7, 2021. Based on her gross pay for these weeks, the claimant had worked 23.5 hours for the week ending January 24, 2021; 27 hours for the week ending January 31, 2021; and 15.21 hours for the week ending February 7, 2021. Applying the rules that went into effect on January 18, 2021, the claimant is deemed to have worked three days during each of the weeks ending January 24, 2021 and January 31, 2021 and two days in the week ending February 7, 2021. As the claimant did not work over four hours in the week ending February 14, 2021, she is deemed to have worked no days that week.

Accordingly, we conclude, for the period of March 23, 2020 through January 17, 2021, that the claimant lacked total unemployment and that for the period of January 18, 2021 through February 14, 2021, she lacked total unemployment on three days in each of the weeks ending January 24, 2021 and January 31, 2021, on two days in the week ending February 7, 2021, and she was totally unemployed in the week ending February 14, 2021.

The credible evidence establishes that the claimant received \$5,798 in regular unemployment insurance benefits as a result of these certifications. Therefore, regular unemployment insurance benefits that the claimant received for each week or day that the claimant lacked total unemployment were overpaid. With the exception of her certification on April 8, 2020 for the week ending April 5, 2020, each week she certified to zero days of work, an incorrect number of days worked. Each of these certifications is a factually false statement, and the regular unemployment insurance benefits that the claimant received for those weeks is recoverable.

However, the claimant's April 8, 2020 certification that she worked four days in this week ending April 5, 2020 is accurate. There is no contention that her recertification for this week on May 12, 2020 is a willful misrepresentation. Therefore, any regular unemployment insurance benefits received by the claimant for the week ending April 5, 2020 are not recoverable.

Further, the credible evidence establishes that the claimant received \$12,300

in FPUC benefits, \$4,683 in PEUC benefits, and \$1,800 in LWA benefits. As the claimant was ineligible for regular unemployment insurance benefits through January 17, 2021, she was overpaid \$12,300 in FPUC benefits, and \$1,800 in LWA benefits. Consistent with federal law, these overpaid federal benefits are recoverable.

Accordingly, the amount of the recoverable overpayment of regular unemployment insurance, FPUC, PEUC, and LWA benefits is referred to the Department of Labor for recalculation in accordance with this decision.

The credible evidence establishes that each time the claimant certified for benefits, she was reminded to report each day or hours of work. Since the claimant had access to the on-line handbook, whether read or not, she is bound by its advice to report all work. Further, as part of the recertification she was directed to accurately complete the form. The claimant knew she was working for this employer. For the period through

January 17, 2021, the certification question regarding the number of days worked is a simple straightforward question not requiring specialized knowledge. In light of the handbook's advice, the clearly worded question, and the instructions when recertifying for the week ending April 5, 2020, we are not persuaded that the claimant was urged by the Department of Labor to falsely state the number of days or hours she worked each week.

Accordingly, we conclude that, with the exception of the April 8, 2020 certification, which was accurate, and the May 12, 2020 recertification, which is not at issue, each of the claimant's certifications constitutes a willful misrepresentation. With a willful misrepresentation and a recoverable overpayment, the civil penalty was properly assessed. The amounts of the forfeiture penalty and the civil penalty are referred back to the Department of Labor for recalculation in accordance with this decision.

DECISION: In Appeal Board No. 622555, the decision of the Administrative Law Judge, insofar as appealed from, is modified as follows and, as so modified, is affirmed.

In Appeal Board No. 622555, the initial determination, holding the claimant ineligible to receive benefits, effective March 22, 2020 through February 14, 2021, on the basis that the claimant was not totally unemployed, is modified to be effective March 23, 2020 through January 17, 2021, plus three days in

each of the weeks ending January 24, 2020 and January 31, 2020, and two days in the week ending February 7, 2021, only, and, as so modified, is sustained.

In Appeal Board No. 622556, the decision of the Administrative Law Judge, insofar as appealed from, is modified as follows and, as so modified, is affirmed.

In Appeal Board No. 622556, the initial determination, charging the claimant with an overpayment of \$5,798 in regular unemployment insurance benefits recoverable pursuant to Labor Law § 597 (4), \$12,300 in Federal Pandemic

Unemployment Compensation (FPUC) benefits recoverable pursuant to Section 2104 (f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020, \$4,683 in Pandemic Emergency Unemployment Compensation (PEUC) benefits recoverable pursuant to Section 2107 (e)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020, and \$1,800 in Lost Wages Assistance (LWA) benefits recoverable pursuant to 44 CFR Sec. 206.120 (f)(5), is modified in accordance with this decision, and, as so modified, is sustained.

In Appeal Board No. 622557, the decision of the Administrative Law Judge, insofar as appealed from, is modified as follows and, as so modified, is affirmed.

In Appeal Board No. 622557, the initial determination, reducing the claimant's right to receive future benefits by 376 effective days and charging a civil penalty of \$869.70 on the basis that the claimant made willful misrepresentations to obtain benefits, is modified in accordance this decision and, as so modified, is sustained.

The amount of the recoverable overpayment of regular unemployment insurance, FPUC, PEUC, and LWA benefits is referred to the Department of Labor for recalculation in accordance with this decision.

The amount of the overpayments and the amount of the forfeiture penalty and the civil penalty are referred back to the Department of Labor for recalculation in accordance with this decision.

The claimant is denied benefits with respect to the issues decided herein.

MARILYN P. O'MARA, MEMBER